

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

COMMUNITY HOLDINGS, INC. d/b/a
THE HERALD BULLETIN
Employer

and

Case 25-RC-10454

GRAPHIC COMMUNICATIONS UNION
LOCAL 17M a/w GRAPHIC COMMUNICATIONS
CONFERENCE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held February 13, 2009, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.¹

I. ISSUES

The Graphic Communications International Union Local 17-M (hereafter the "Petitioner") seeks an election within a unit comprised of all haulers and motor route carriers employed by Community Holdings, Inc. d/b/a the Herald Bulletin (hereafter the "Employer").

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer contends that the individuals filling the job positions the Union is seeking to represent are not employees of the Employer within the meaning of Section 2(3) of the Act. The Employer argues that all of the individuals in those positions are independent contractors and thus, the unit sought by the Union has no employees.

The Petitioner argues that individuals in question are not independent contractors but are rather employees of the Employer under Section 2(3) of the Act.

II. DECISION

The evidence produced at hearing, more fully discussed below, establishes that the haulers and carriers employed by the Employer are not employees within the meaning of Section 2(3) of the Act. Those individuals are instead independent contractors. This finding is based on the Board's decisions in St. Joseph News-Press, 345 NLRB 474 (2005) and Arizona Republic, 349 NLRB 1040 (2007). Both of those cases involved individuals contracted by a newspaper to deliver its product to homes and retail outlets, and in both cases the Board found that the individuals in question were independent contractors and not employees under the Act.

III. STATEMENT OF FACTS

The Employer is a limited liability corporation with its headquarters in Birmingham, Alabama. The Employer owns and operates a number of newspapers throughout the United States including several in Indiana. One of the Indiana newspapers owned and operated by the Employer is the Herald Bulletin. The *Herald Bulletin* is a morning newspaper based in Anderson, Indiana and is published seven days a week. Henry Bird is the Publisher of the *Herald Bulletin*. Amy Winter is the Circulation Director and reports to Bird. Tony Rettig and Susan Brooks hold the positions of Home Delivery Manager and Distribution Manager, respectively, and both report to Winter. There are also four District Managers, Eric Francis, John Rodebush, Dana Vance and Mike Franklin, who are each assigned to a specific geographic region, and who each report to Rettig.

As part of its operations, the Employer contracts with individuals to transport its newspapers from the facilities where they are printed to the homes of subscribers and to various retail outlets. These individuals fall into two classifications, hauler and carrier. The Employer has approximately 14 haulers and 90 carriers. The 14 haulers are contracted to pick up bundled newspapers at either the Employer's facility in Anderson, Indiana or at a facility in Greenfield, Indiana with which the Employer has contracted to print some of the Employer's newspapers.² The bundles are then delivered either to designated drop points, where they are retrieved by the carriers, or to retail outlets and vending boxes. The number of carrier drop points each hauler is responsible for varies with the low being one and the high being five. The number of retail outlets and vending boxes an individual hauler is responsible for can be as high as 30.

² Approximately half of the haulers pick up their bundles in Anderson, and the other half pick up their bundles in Greenfield.

The bundled newspapers are generally available for the hauler to pick up at 12:30 a.m. at the Greenfield facility and between 1:30 and 2:30 a.m. at the Anderson facility. In addition to the Employer's newspapers, haulers also pick up other periodicals which the Employer has contracted to deliver. These other periodicals include the *Indianapolis Star*, *Wall Street Journal*, and *Barrons*, among others. Haulers are required as part of their agreement with the Employer to have the bundled papers delivered to their assigned drop points by 3:30 a.m. If a hauler has more than one drop point, he or she is allowed to determine the order in which the drops will be made. Once the bundled papers are delivered to the drop points, haulers who are responsible for retail outlets or vending boxes deliver the papers to those locations. Haulers who have those additional responsibilities generally are finished with their duties by around 5:00 a.m.

The Distribution Manager, Susan Brooks, is primarily responsible for contracting with the haulers on behalf of the Employer. Each hauler is required to sign a document entitled "Independent Contractor Hauler Agreement." This document is prepared by the Employer. The document sets forth the various responsibilities of the hauler, specifically identifies him or her as an independent contractor, and also sets forth the hauler's rate of pay. Each hauler is paid a flat rate for their duties and is paid twice a month. The flat rate is reached through negotiation between the hauler and the Employer. Brooks has personally negotiated approximately 90% of the current hauler agreements. In its negotiations, the Employer considers the amount of driving a hauler will have to do and the number of newspapers being hauled in computing the haulers' rates. Each hauler, thus, has a different rate of compensation with the lowest amount being \$150. There was no evidence on the highest amount paid to a hauler. The length of the agreements also varies. They are generally for 3, 6, 9, or 12 month terms. The length of the agreement is also something that is negotiated by the hauler with the Employer. Either party can terminate the agreement for any reason by giving 30 days notice to the other party.

As set forth above, the Employer also contracts with approximately 90 carriers. Carriers are responsible for picking up the newspapers at the drop points,³ assembling the papers and putting them in rubber bands or bags if necessary,⁴ and then delivering the newspapers to home subscribers. The Employer contracts with each carrier to deliver newspapers to a specified route. The number of subscribers on each route varies, and many carriers have contracted with the Employer to deliver newspapers to more than one route. Each carrier is free to determine the order in which he or she will deliver the newspapers on his or her route, but carriers must deliver to all customers listed on their route. The only other requirements are that all newspapers are to be delivered by 6:00 A.M. to a clean, dry, convenient location at the subscriber's home.

Carriers are not permitted to subcontract their route, but they are permitted to hire helpers and substitutes to assist them. They are permitted to do this without the permission or oversight of the Employer. In addition to the Employer's newspaper, carriers also deliver the other periodicals mentioned above to customers on their route who have subscribed to those

³ About five carriers pick up their newspapers directly at the Employer's Anderson facility.

⁴ Carriers are required to supply their own bags and rubber bands. These items can be purchased from the Employer.

publications. Carriers are required to deliver those other periodicals and may not refuse to do so. If a customer complains to the Employer that he or she did not receive a newspaper or that the newspapers was damaged or incomplete, a District Manager will generally take the customer a new newspaper, and the carrier assigned to that route will be assessed a \$5.00 complaint fee. On some occasions the carriers are given the opportunity to respond to the complaint, and if the Employer finds the carrier was not at fault, the complaint fee is not assessed. On other occasions, however, the fee is assessed without input from the carrier.

The Home Delivery Manager, Tony Retting, and the District Managers are primarily responsible for contracting with the carriers although the Distribution Manager sometimes fills this role as well. Each of the carriers is required to sign an “Independent Contractor Carrier Agreement” prepared by the Employer. This agreement specifically identifies the carrier as an independent contractor. The length of each agreement varies but is generally for either 3, 6, 9, or 12 months and can be terminated by either party with 30 days notice. The Employer may also terminate the contract immediately if delivery is not being performed in a satisfactory manner.

The agreement requires the carriers to purchase the newspapers for his or route or routes at a negotiated wholesale rate and then resell the papers to subscribers on their route or routes at a retail rate set solely by the Employer. Thus each carrier is paid a per piece rate with the amount of their compensation determined by the wholesale rate they negotiate with the Employer and the number of customers on their route or routes. The piece rate for carriers generally falls somewhere between \$.075 and \$.085 per customers. All billing and collections from the customers are handled by the Employer. Some carriers, who have a larger geographic route with fewer customers, are also paid a negotiated route allowance. This is a flat rate amount for the route that can vary between \$20 and \$600. Carriers are also paid twice a month.

The Employer makes no deductions from the pay of either haulers or carriers. The Employer issues 1099 forms to both haulers and carriers at the end of the year showing their total compensation. Neither haulers nor carriers receive any of the benefits given by the Employer to its employees. Among these benefits are paid vacation, health insurance, and pension benefits. Haulers and carriers do not participate in any employee meetings. No employees of the Employer regularly perform the same duties as those performed by haulers and carriers.⁵

IV. DISCUSSION

The sole issue in this matter is whether the Employer’s haulers and carriers are employees within the meaning of Section 2(3) of the Act or independent contractors. If haulers and carriers are independent contractors, then they are not protected by the Act, and the petition must be dismissed. Arizona Republic, 349 NLRB 1040, 1046 (2007).

⁵ District Managers do perform carrier duties if a route in their district is open or a customer fails to receive a newspaper. It is not a regular or routine part of a District Manager’s duties.

A. Legal Principles

The test used to determine when an individual is an employee under the Act and when an individual is an independent contractor was set forth by the Board in Roadway Package System, 326 NLRB 842 (1998). In that case the Board used the common-law test for agency to determine whether the employer's delivery drivers were statutory employees or independent contractors. The test as recently articulated in Arizona Republic, 349 NLRB 1040, 1042 (2007), includes the following factors for determining independent contractor status:

- (a) the extent of control which, by agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by time or by the job;
- (h) whether or not the work is part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relationship of master and servant; and
- (j) whether the principal is or is not in business.

The Board, however, stated that these ten factors are not exclusive and that all aspects of an individual's relationship to the employer would be considered.⁶ Roadway Package System, 326 NLRB 842, 850 (1998)

⁶ The Petitioner argues that the additional factor of economic dependence should be considered in determining independent contractor vs. statutory employee status. The Board, however in Arizona Republic, rejected this as an additional factor to be considered in determining independent contractor status. Id. at 1043 (fn.4).

The Board subsequently applied the above test and the reasoning of Roadway to the issue of whether carriers and haulers working for a newspaper were independent contractors. St. Joseph News-Press, 345 NLRB 474 (2005). In that case a union commenced an organizing campaign among the haulers and carriers of the *St. Joseph News Press*. In response to that campaign, the Employer allegedly committed a number of violations of Section 8(a)(1) and (3) of the Act. The administrative law judge who conducted the hearing made a finding that the employer had in fact committed the alleged violations of the Act and entered a recommended order. The employer filed exceptions to the Board, and the Board overruled the judge and dismissed the complaint on the grounds that the haulers and carriers were independent contractors and not entitled to the protection of the Act.

In St. Joseph the employer operated a daily newspaper. It contracted with haulers to pick up bundled newspapers at the plant and deliver them to common drop points. Carriers then picked up the newspapers at the drop points and delivered the papers to customers as well as to retail outlets and vending boxes. Carriers and haulers were required to sign a contract with the employer setting the deadline by which time newspapers must be delivered as well as a wholesale rate that carriers were paying for the newspapers. The contracts were for an indefinite length of time but could be terminated with 30 days notice. Most customers paid the employer for their subscriptions but some paid the carriers directly. Each carrier was free to change the orders of their deliveries and could refuse to deliver to a particular customer. Each hauler and carrier supplied their own vehicle and could contract for more than one route and hire substitutes to make deliveries on those routes.

In determining that the haulers and carriers were independent contractors in the St. Joseph case, the Board relied on the low degree of control exercised by the employer over the haulers and drivers. Id. at 478. More specifically the Board stated that the carriers were free to change the order of delivery, to disregard customer delivery requests without fear of discipline, and to refuse to deliver to customers they deemed unlikely to pay or to whom it would not be economically feasible to deliver. Id. The Board also relied upon the fact that haulers and carriers were responsible for supplying their own tools, more specifically the vehicles used to make the deliveries. Id. At 479. The Board also relied on the carriers' ability to impact their own income through their ability to hire substitutes and contract for more than one route. Id. The Board also relied on the lack of direct supervision and the fact that the contracts between the parties specifically stated that they were creating an independent contractor relationship. The Board held that the above factors outweighed the fact that haulers and carriers were performing an integral part of the employer's business, that their work was unskilled, that they were contracted for an unspecified length of time, and that several acknowledged employees also regularly made deliveries. The Board weighed all of the above factors and determined that they supported a finding that haulers and carriers were independent contractors. Id.

The Board also considered the issue of whether newspaper carriers were independent contractors in Arizona Republic, 349 NLRB 1040 (2007). In that case the union petitioned to represent a unit of approximately 1260 newspaper carriers. The Board held that the carriers were independent contractors and dismissed the petition. In Arizona Republic carriers picked up their newspapers at one of nine distribution centers and then delivered the newspapers on their delivery routes. Carriers used their own vehicles but had to show the employer proof of

insurance and a valid driver's license. Carriers were required to sign a contract with the employer identifying them as an independent contractor and which required that newspapers be delivered by 5:30 a.m. Monday through Friday, 6:00 a.m. on Saturday, and 6:30 a.m. on Sunday. Carriers could have more than one route and were permitted to use helpers and substitutes.

The Board's decision that the carriers in Arizona Republic were independent contractors was based on several factors including the lack of control the employer exercised over the carriers' work duties. The Board especially emphasized the ability of carriers to reorder their routes. Id. at 1043. The Board also relied on the lack of direct supervision of carriers including the fact that there was no disciplinary system and no written work rules. Carriers were also required to supply their own vehicles as well as supplies such as plastic bags and rubber bands. Id. at 1044. The carriers were also free to assemble their papers wherever they wished. The Board also relied on the carriers' ability to hire substitutes and contract for more than one route as well as negotiate their piece rate with the employer. Finally, the parties' contract clearly indicated that they were establishing an independent contractor relationship. Id. at 1045. The Board ruled that these factors outweighed the fact that the carriers performed work which was an integral part of the employer's business, the unskilled nature of their duties, that they were hired for an indefinite period, and that some employees performed similar work.

B. Application of the Law

Applying the decisions in St. Joseph and Arizona Republic to the instant case clearly leads to a finding that the haulers and carriers in the instant case are independent contractors as well. The same factors present in those earlier cases are present in the current case.

1. The hiring party's degree of control over the details of work

First, the Employer's lack of control over work duties is the same in the instant case as in St. Joseph and Arizona Republic. Both the haulers and carriers are free to determine at what time after the papers are ready they retrieve them for delivery and also the order in which they drop or deliver the newspapers. The haulers and carriers may make changes to their delivery order without consultation with the Employer. While it is true that in St. Joseph carriers were also responsible for collection of payment from customers, which is not true of the instant case, the carriers in Arizona Republic did not engage in those activities either. Indeed, in St. Joseph the majority of the customers paid the company directly rather than deal with the carriers. Although, the haulers and carriers in the instant case are not free to refuse to deliver to customers as the carriers in St. Joseph, the Board in Arizona Republic concentrated on the carriers' ability to determine and reorder their routes, in determining the employer's degree of control over the work. The haulers and carriers in the instant case, clearly have that same right to determine the sequence of their pick-ups, drops and deliveries. Therefore, the Employer's lack of control over the work duties of the haulers and carriers is a factor in favor of finding that those individuals are independent contractors.

2. The hiring party's degree of supervision

In addition, the Employer in the instant case, just like the employers in St. Joseph and Arizona Republic, exercises little to no direct supervision over the haulers and carriers. The record makes it clear that most haulers and carriers rarely have any contact with the Employer's supervisory personnel. Such conduct is generally limited to "bundle tops" which accompany the bundle of newspapers each morning and contains written information regarding any changes in customer status for that delivery day. A District Manager may go out with a new carrier to show them the route and help locate addresses, however, it is just as likely that the previous carrier would perform this task. The haulers and carriers are not subject to the Employer's employee handbook or any other rules of conduct. Although, the Employer may charge a carrier \$5.00 based on a customer complaint of non-delivered or misdelivered paper, there is no evidence of any type of progressive disciplinary system in place for the haulers and carriers. Therefore, since the haulers and carriers are not subject to discipline, nor are they bound by the Employers work rules, this factor weighs in favor of a finding that the haulers and carriers are independent contractors.

3. The provision of supplies, instrumentalities, and places of work

Haulers and carriers in the instant case, like the haulers and carriers in St. Joseph and Arizona Republic, are also required to provide their own work tools, specifically their vehicles, plastic bags and rubber bands. Although, many of the carriers may purchase their bags and rubber bands from the Employer, there is no requirement that they do so. In addition, while the Employer makes tables available at its Anderson dock for carriers to prepare newspapers for delivery, the carriers are free to engage in such preparation anywhere they choose. Accordingly, this factor weighs in favor of a finding of independent contractor.

4. Method of compensation and entrepreneurial potential

Like the carriers in the two earlier decisions, the haulers and carriers in the instant case are free to hire substitutes and helpers to assist them with their routes without clearance by the Employer. Any payment to these substitutes and helpers is solely at the discretion of the hauler or carrier. In addition, the haulers and carriers are free to contract for more than one route, and many of them do so. The Petitioner claims that the agreement between the haulers and carriers and Employer discourages haulers and carriers from using substitutes and/or helpers to increase their profit margin. In support of this position, Petitioner points to language in the agreements between the haulers and carriers and the Employer in which the contractor "agrees to personally devote such time as is necessary to fulfill contractor's obligations under this contract." Such language, however, does not clearly evince that the Employer discourages such conduct and in fact leaves it up to the hauler or carrier as to what level of personal time each route takes to fulfill his or her obligations.

In addition, the record demonstrates that the haulers and carriers have the ability to negotiate their rates. The fact that the Employer has a range of rates it uses to make its contract with the hauler or carrier profitable, does not negate the fact that each hauler or carrier has the opportunity to negotiate their rate within that range; the haulers for their flat rate and the carriers

for their wholesale piece rate and possibly for a route allowance. Thus, this factor weighs in favor of a finding that haulers and carriers are independent contractors.

5. The parties' intent

Just as in the previous cases, the parties' contracts in the instant case make it clear that they are intending to establish an independent contractor relationship, based on the express language of the "Independent Contractor Hauler Agreement" and "Independent Contractor Carrier Agreement." While the Petitioner argues that because such language in the agreements is non-negotiable, this factor should weigh in favor of employee status, the Board has specifically rejected such an argument in Arizona Republic, supra at 1045. The record is clear that the haulers and carriers are not eligible for any of the benefits provided by the Employer to its employees, including insurance and health benefits. Nor, does the Employer make any deductions from the haulers and carriers pay. In light of the language in the contract and the absence of any Employer provided benefits as those provided to its employees, it is concluded that this factor weighs in favor of finding that the haulers and carriers are independent contractors.

6. Integral part of Employer's business; level of skill required; duration of relationship; and similar work performed by Employer's employees

As for the remaining common-law factors, such factors tend to weigh in favor of finding that haulers and carriers are statutory employees. The work of distributing newspapers to carriers, retail outlets, vending boxes and customers is clearly an integral part of the Employer's business. Both the haulers and carriers perform work which is generally unskilled. As for the duration of employment, contracts between the Employer and the individual haulers and carriers are for one year at most, and some are for just a few months. The parties must then renegotiate a new contract after the previous one expires. The evidence, however, indicates that some carriers and haulers have contracted with the Employer for between four and twenty years. Similar facts in Arizona Republic led to a determination that carriers were employed for an indefinite period, supra at 1046. Finally, there is some indication that district managers perform similar distribution work when routes are open or in redelivering missing or damaged newspapers.

V. CONCLUSION

Just as in St. Joseph and Arizona Republic, the above factors in favor of a finding that haulers and carriers are independent contractors outweigh those in favor of a finding of statutory employees. The lack of Employer control of the haulers and carriers details of work; the lack of Employer supervision and subjection to Employer rules and disciplinary procedure; the hauler and carrier supplied vehicles and other supplies; the entrepreneurial control and ability to negotiate compensation; and the intention of the parties to form a independent contractor relationship outweigh such factors as the work being integral to the Employer's business, unskilled, and occasionally performed by the Employer's employees.. Based on all of the above, the haulers and carriers in the instant case meet the standards for a finding of independent

contractor status as set forth in St. Joseph News-Press, 345 NLRB 474 (2005) and Arizona Republic, 349 NLRB 1040 (2007).

VI. ORDER

Accordingly, based upon the evidence described above, it is concluded that the haulers and carriers are independent contractors and not employees protected by the Act. Therefore, the undersigned hereby ORDERS that the petition filed in this matter is dismissed.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **April 1, 2009**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,⁷ but may not be filed by facsimile.

SIGNED at Indianapolis, Indiana, this 18th day of March 2009.

/s/ Rik Lineback

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⁷ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.